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HUB LAW OFFICES

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 FOR THE COUNTY OF MARIN

12 CHURCH OF SCIENTOLOGY)
13 INTERNATIONAL, a California not-for-profit)
religious corporation;)

14 Plaintiffs,)

15 vs.)

16 GERALD ARMSTRONG; MICHAEL)
17 WALTON; et al.,)

18 Defendants.)

19 _____)
20 GERALD ARMSTRONG,)

21 Cross-Complainant,)

22 vs.)

23 CHURCH OF SCIENTOLOGY)
INTERNATIONAL, a California Corporation;)
24 DAVID MISCAVIGE;)

DOES 1 to 100;)

25 Cross-Defendants.)

26
27
28

CASE NO. 157 680

CHURCH OF SCIENTOLOGY
INTERNATIONAL'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
ITS DEMURRER TO GERALD
ARMSTRONG'S FIRST AMENDED
CROSS-COMPLAINT

DATE: March 25, 1994

TIME: 9:00 a.m.

DEPT: 1

DISCOVERY CUT-OFF: None

MOTION CUT-OFF: None

TRIAL DATE: None

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I. INTRODUCTION

1
2 On November 30, 1993, defendant Gerald Armstrong filed a cross-complaint
3 in this action ("the Second Cross-complaint") which was entirely duplicative of a
4 cross-complaint that Armstrong had previously filed against plaintiff Church of
5 Scientology International ("the Church") in another action. When the Church, by
6 demurrer, pointed out that Armstrong had merely word-processed one cross-
7 complaint into a second, Armstrong offered no opposition, but simply filed a First
8 Amended Cross-complaint ("the Third Cross-complaint"). While Armstrong has
9 used different language in the Third Cross-complaint, he has not managed to cure
10 any of the defects which made his Second Cross-complaint subject to demurrer.
11 Demurrer must be sustained to the Third Cross-complaint, with prejudice.

12 As with the Second Cross-complaint, the rambling allegations of the Second
13 Cross-complaint do not, as a matter of law, state a claim for abuse of process.
14 The allegations all delineate conduct which is: (a) barred on its face by the statute
15 of limitations; and/or (b) privileged pursuant to Civil Code § 47(2). The Church's
16 demurrer should be sustained for this reason alone.

17 Moreover, although the Third Cross-complaint contains different language
18 combinations from the Second Cross-complaint, the claims made in the Third
19 Cross-complaint nonetheless duplicate the claims made in a cross-complaint filed
20 by Armstrong in Case No. BC 052395, Los Angeles Superior Court ("the First
21 Cross-complaint").

22 Further, Armstrong's new claim for "declaratory relief" fails because it seeks
23 only to re-litigate issues presently pending in either this or another forum.

24 As demonstrated below, for excellent policy reasons, under California law a
25 party is not permitted to simultaneously maintain identical actions in two different
26 forums, again justifying the sustaining of the Church's demurrer. At the very least,
27 litigation of the Third Cross-complaint must be abated until after there is a final
28 determination of Armstrong's claims on the First Cross-complaint.

1 First Cross-complaint.¹ In the Third Cross-complaint, Armstrong is more clever.
2 Rather than duplicating the exact language of the First Cross-complaint, he has
3 simply duplicated his claims, using different, more detailed, and more outrageous
4 language to describe the same alleged occurrences. Nonetheless, the Third Cross-
5 complaint complains, just as does the First, that the settlement of Armstrong's
6 underlying litigation in 1986 and subsequent claimed actions by the Church
7 amount to "abuse of process."² Almost all of the claimed events described in the
8 Third Cross-complaint are thus described in some form in the First Cross-complaint,

9
10 ¹ As can be seen from a review of the First and Second Cross-complaints, both
11 documents are rambling diatribes which allege conduct by "the ORG" (First Cross-
12 Complaint) or "Scientology" (Second Cross-complaint). Most of the allegations
13 concern actions which allegedly happened to non-parties, or which supposedly
14 occurred many years ago. The First Cross-complaint contains 72 paragraphs.
15 Sixty of those paragraphs have been duplicated in the Second Cross-complaint,
16 modified only to accuse "Scientology" instead of the "ORG," to add a few phrases
17 of irrelevant hyperbole and to delete references to previously named cross-
18 defendants. [Exs. __ and __ to Request for Judicial Notice.] The origin of each
19 paragraph in the Second Cross-complaint and in the First Cross-complaint can be
20 easily observed by directly comparing the two documents, with the following
21 correlation. The list shows the identity of paragraphs by listing first, the paragraph
22 in the First Cross-complaint and second, the identical paragraph in the Second
23 Cross-complaint, as: "First Cross-complaint Paragraph Number: Second Cross-
24 complaint Paragraph Number": 1:1; 2:2; 4:3; 6:4; 7:5; 8:6; 9:7; 12:8; 13:9;
25 14:10; 15:11; 16:12; 17:13; 18:14; 19:15; 20:16; 21:17; 22:18; 23:19; 24:20;
26 25:21; 26:22; 27:23; 28:24; 29:25; 30:26; 31:27; 32:28; 33:29; 34:30; 35:31;
27 36:32; 37:33; 38:34; 39:35; 40:36; 41:37; 42:38; 43:39; 44:40; 45:41; 46:42;
28 47:43; 48:44; 49:45; 50:46; 51:47; 52:48; 53:49; 54:50; 55:51; 56:52; 57:53;
58:56; 64:57; 65:58; 66:59; 67:60; 68:61; 69:62. [Id.]

The only paragraphs which Armstrong did not duplicate from the First Cross-
complaint consist of paragraphs identifying additional cross-defendants (e.g., ¶¶ 3,
5, 10, 11), none of whom were ever served, and paragraphs defining claims for
declaratory relief and breach of contract (¶¶ 59 - 63, 70 - 72).

² While the allegations are not identical in language, the subjects described are.
The list shows the similarity of paragraphs by listing first, the paragraph in the First
Cross-complaint and second, the paragraph describing the same claimed events in
the Third Cross-complaint, as: "First Cross-complaint Paragraph Number: Third
Cross-complaint Paragraph Number": 1:1; 2:2; 6:4; 7:5; 8:6; 12:8, 13:9 -12, 18-
20; 14:21-23; 14-20:26-34; 24:37-40; 27:41; 30:42; 32-40:42; 41-42:43-44;
53:45-46; 54-56:47; 60-62:55(a); 65:57; 66:58, 60; 67:61; 68:62; 69:63.

1 and were also contained in the defective Second Cross-complaint. Those few
2 allegations actually added by Armstrong all allege matters long barred by the
3 relevant statute of limitations,³ with only two exceptions. In paragraphs 48-53,
4 Armstrong claims that the Church abused process by filing and prosecuting two
5 actions against him: Church of Scientology International v. Armstrong, LASC No.
6 BC 084642, and the instant action.

7 In addition, Armstrong has included a cause of action for declaratory relief,
8 in which he asks for (1) a declaration as to the legality and enforceability of the
9 underlying settlement agreement, which is the precise subject of his request for
10 declaratory relief in the First Cross-complaint and (2) declarations pertaining to the
11 application of the Uniform Fraudulent transfer act to this action, which are the
12 precise subject of the Church's complaint herein.

13 **III. DEMURRER MUST BE SUSTAINED AS TO ARMSTRONG'S**
14 **CAUSE OF ACTION FOR ABUSE OF PROCESS**

15 **A. Demurrer Must Be Sustained Because Armstrong Has Not**
16 **And Cannot Allege Facts Sufficient To State A Claim For**
17 **Abuse Of Process**

18 The Third Cross-complaint for abuse of process is inadequate because: (1)
19 the alleged pre-November 30, 1992 conduct is precluded by the one-year statute
20 of limitations; and (2) the alleged post-November 30, 1992 conduct is absolutely
21 privileged pursuant to Civil Code Section 47(2).⁴

22 The Second Cross-complaint was filed on November 30, 1993. As will be
23 discussed, conduct occurring before November 30, 1992 is precluded by the

24 ³ See Part III, A.1, infra.

25 ⁴ The Church does not, by the making of this demurrer, admit that any of the
26 conduct alleged by Armstrong actually occurred; indeed, the bulk of the pre-
27 November, 1992 acts which Armstrong alleges are demonstrable figments of his
28 fertile imagination. For purposes of demurrer, however, all of the allegations of the
Cross-complaint must be assumed to be true. Any factual dispute as to these
allegations is irrelevant; even as alleged, they do not state a claim for abuse of
process.

1 applicable limitations statute. The only conduct alleged by Armstrong which is
2 alleged to have occurred after November 30, 1992, is alleged in paragraphs 48 and
3 49.⁵ These paragraphs, however, allege merely that the Church⁶ filed two
4 complaints against Armstrong, and attempt, by later rhetoric without substance, to
5 assign improper motives to the filing of the complaints and prosecution of the
6 actions.⁷ The Third Cross-complaint does not allege that either of these claims
7 have been terminated in a manner favorable to Armstrong; indeed, this Court may
8 take judicial notice that both are presently pending against Armstrong. [Exs. 6, 7
9 and 9 to Request for Judicial Notice.]

10 1. The Conduct Alleged To Have Occurred Before November 30,
11 1992 Is Precluded by the Statute of Limitations

12 The one-year statute of limitations pursuant to Code of Civil Procedure
13 Section 340 applies to a cause of action for abuse of process. Thornton v. Rhoden

14 ⁵ These paragraphs state:

15 48. On July 8, 1993, after Armstrong II was stayed
16 Scientology filed a lawsuit captioned Church of Scientology
17 International v. Gerald Armstrong & The Gerald Armstrong
18 Corporation, Los Angeles Superior Court Case No. BC 084642
19 ("Armstrong III") claiming again that it was seeking liquidated
damages for alleged contract breaches and asking for injunctive relief.
Armstrong III has also been stayed pending the outcome of the appeal
from the Sohigian ruling.

20 49. On July 23, 1993, Scientology filed a lawsuit captioned
21 Church of Scientology International v. Gerald Armstrong, Michael
22 Walton & The Gerald Armstrong Corporation, Marin Superior Court
Case No. 157680 ("Armstrong IV") claiming to be a creditor of
Armstrong and alleging a conspiracy to defraud it of liquidated
damages it claimed were owed by Armstrong.

23 ⁶ Actually, Armstrong alleges that "Scientology" filed the actions.
24 "Scientology" is the name of a religion, not of any party to this action, and is never
25 defined otherwise in the cross-complaint. The Church assumes, for the purposes
26 of this demurrer, that the Court would infer that Armstrong intends to attribute
these actions to the Church and not some other defendant.

27 ⁷ Paragraphs 50-53 which follow these paragraphs do not allege any conduct at
28 all, but simply attempt, by virulent rhetoric, to assign improper motive to the filing
of the actions alleged in the quoted paragraphs.

1 (1966) 245 Cal.App.2d 80, 95, 53 Cal.Rptr. 706, 717. In Thornton, the plaintiff
2 alleged that defendant had abused process by taking, transcribing and filing a
3 deposition in which the defendant made false and defamatory claims. The
4 deposition was taken and transcribed more than one year before the action for
5 abuse of process was filed, and filed one year exactly before the filing of the abuse
6 of process complaint. The Court of Appeal found that the alleged taking and
7 transcribing of the deposition were beyond the statute, and could not be
8 considered part of the plaintiff's abuse of process claim. Id.⁸

9 Here, alleged conduct which purportedly occurred prior to November 30,
10 1992 is similarly beyond the statute of limitations, and any abuse of process claim
11 which could possibly attach to those claims (and the Church considers that none
12 could) is time-barred. On the face of the Third Cross-complaint, the conduct
13 alleged in paragraphs 9 through 47 is alleged to have occurred before November
14 30, 1991. Accordingly, the conduct alleged in those paragraphs is barred by the
15 statute of limitations.

16 **2. The Conduct Post-November 30, 1992 Cannot Be the Basis For**
17 **An Abuse of Process Claim Because It Is Privileged**

18 To state a claim for abuse of process, a plaintiff must allege two elements:
19 "first, an ulterior purpose, and second, a wilful act in the use of the process not
20 proper in the regular conduct of the proceeding." Oren Royal Oaks Venture v.
21 Greenberg, Bernhard, Weiss & Karma, Inc. (1986) 42 Cal.3d 1157, 1168, 232
22 Cal.Rptr. 567, 728 P.2d 1202, quoting Templeton Feed & Grain v. Ralston Purina
23 Co. (1968) 69 Cal.2d 461, 466, 72 Cal.Rptr. 344, 446 P.2d 152. Here,
24 Armstrong alleges that the "wilful acts in the use of process" are the filing by
25 "Scientology" of a lawsuit on July 8, 1993, and the filing by "Scientology" of the

26 ⁸ The court went on to hold that defendant's actions were privileged, and
27 "even if we disregard the privilege, it is obvious that just taking the ordinary steps
28 abuse of process." 53 Cal.Rptr. at 720.

1 complaint in this case on July 23, 1993.

2 Civil Code Section 47 provides in relevant part that "A privileged publication
3 or broadcast is one made: . . . (b) In any judicial proceeding. . . ." As the
4 California Supreme Court recently re-emphasized,

5 For well over a century, communications with "some relation"
6 to judicial proceedings have been absolutely immune from tort liability
7 by the privilege codified as section 47(b). At least since then-Justice
8 Traynor's opinion in Albertson v. Raboff (1956) 46 Cal.2d 375, 295
9 P.2d 405, California courts have given the privilege an expansive
reach. Indeed, as we recently noted, "the only exception to [the]
application of section 47(2) [now § 47(b)] to tort suits has been for
malicious prosecution actions. [Citations]."

10 Rubin v. Green (1993) __ Cal.3d __, 17 Cal.Rptr.2d 828, 831, quoting Silberg v.
11 Anderson (1990) 50 Cal.3d 205, 216, 266 Cal.Rptr. 638, 786 P.2d 365. In
12 Rubin, the court held that even communications and communicative conduct
13 bearing "some relation" to an anticipated lawsuit were privileged. Id. at 832 - 838.

14 Moreover, in Oren Royal Oaks, supra, the California Supreme Court,
15 upholding a long line of appellate court cases, held that the exact conduct alleged
16 by Armstrong -- filing or maintaining a lawsuit -- cannot support a claim for abuse
17 of process, stating:

18 The relevant California authorities establish
19 . . . that while a defendant's act of improperly instituting or
20 maintaining an action may, in an appropriate case, give rise to a cause
21 of action for malicious prosecution, the mere filing or maintaining of a
lawsuit -- even for an improper purpose -- is not a proper basis for an
abuse of process action. The overwhelming majority of out-of-state
precedents have reached the same conclusion.

22 42 Cal.3d at 1169 (citations omitted). The Court went on to explain that it agreed
23 with the underlying rationale for these decisions, which is to afford litigants an
24 appropriate accommodation between the freedom of the individual to seek redress
25 from the courts, and the interest of a potential defendant in being free from
26 inappropriate litigation. The Court noted that the common law tort of malicious
27 prosecution, which provides this accommodation, requires that a plaintiff prove
28 that "the prior action (1) was commenced by or at the direction of the defendant

1 and was pursued to a legal termination in his . . . favor . . . ; (2) was brought
2 without probable cause . . . ; and (3) was initiated with malice. . . ." Id., quoting
3 Bertero v. National General Corp. (1974) 13 Cal.3d 43, 50, 118 Cal.Rptr. 184,
4 529 P.2d 608 [citations omitted].

5 If Armstrong were permitted to allege an abuse of process claim against the
6 Church merely by alleging that the Church had filed a lawsuit for some ulterior
7 purpose, the protections afforded by the requirements of a malicious prosecution
8 claim would be annihilated. In the words of the California Supreme Court,

9 If . . . the filing of an action for an improper 'ulterior' purpose
10 were itself sufficient to give rise to an abuse of process action, the
11 'lack-of-probable-cause' element of the malicious prosecution tort
12 would be completely negated; even if an individual could demonstrate
13 that he had reasonable cause to believe that his initial lawsuit had
14 merit when he filed the action, he would still face potential liability
15 under an abuse of process theory. Because the lack-of-probable-
16 cause requirement in the malicious prosecution tort plays a crucial role
17 in protecting the right to seek judicial relief, we agree with the prior
18 decisions which have concluded that this element may not be
19 circumvented through expansion of the abuse of process tort to
20 encompass the alleged improper filing of a lawsuit.

21 Id. at 1169-1170 (citations omitted, emphasis supplied).

22 Here, the only conduct which Armstrong has alleged in his Second Cross-
23 complaint which is not barred by the statute of limitations is the filing of two
24 lawsuits by the Church.⁹ These allegations, without more, cannot, under Oren
25 Royal Oaks, support a claim for abuse of process. Moreover, because neither of
26 the actions concerning which Armstrong complains have been "pursued to legal
27 termination in [Armstrong's] favor," Armstrong cannot by repleading state a claim
28 for malicious prosecution. Id. Under these circumstances, the Court should sustain
the Church's demurrer without leave to amend.

///

///

⁹ This is also the only conduct alleged which has not already been alleged by
Armstrong in his First Cross-complaint.

1 **B. Demurrer Must Be Sustained Because There Is Another**
2 **Action Pending Between The Same Parties On The Same**
3 **Cause of Action**

4 Even if the Court determines that Armstrong's Third Cross-complaint could
5 somehow allege a claim for abuse of process, demurrer must still be sustained.
6 Code of Civil Procedure Section 430.10(c) provides, in relevant part, that a cross-
7 defendant may object to a cross-complaint by demurrer when, "[t]here is another
8 action pending between the same parties on the same cause of action." Demurrer
9 is proper in such a case because the first suit affords an ample remedy, rendering
10 the second action unnecessary and vexatious. National Auto. Ins. Co. v. Winter
11 (1943) 58 Cal.App.2d 11, 16, 136 P.2d 22, 25. "It is not the policy of the law to
12 allow a new and different suit between the same parties, concerning the same
13 subject matter, that has already been litigated. Neither will the law allow the
14 parties to trifle with the courts by piecemeal litigation." Wulfjen v. Dolton (1944)
15 24 Cal.2d 891, 151 P.2d 846, 848, quoting Bingham v. Kearney 136 Cal. 175,
16 177, 68 P. 597.

17 Accordingly, the law will not permit a cross-defendant to be oppressed by
18 two actions for the same cause of action where the cross-complainant has a
19 complete remedy in one action. Fresno Investment Co. v. Russell (1921) 55
20 Cal.App. 496, 497, 203 P. 815. The second action will be abated by demurrer.
21 Furthermore, where the conditions for an order of abatement exists, such an order
22 issues as a matter of right and not as a matter of discretion. Lawyers Title Ins.
23 Corp. v. Superior Court (1984) 151 Cal.App.3d 455, 460, 199 Cal.Rptr. 1, 4.¹⁰

24 Here, through the addition of two new allegations -- amendments which

25 ¹⁰ This is the case because "[u]nder the rule of exclusive concurrent
26 jurisdiction, when two superior courts have concurrent jurisdiction over the subject
27 matter and the parties, the first court to assume jurisdiction has exclusive and
28 continuing jurisdiction until such time as all necessarily related matters have been
29 resolved." Lawyers Title Ins. Corp., supra, 151 Cal.App.3d at 460, 199 Cal.Rptr.
30 at 4 (citation omitted).

1 allege only privileged conduct, see Part III A 2, supra -- Armstrong seeks to allege a
2 "different" cause of action for abuse of process. These changes do nothing to
3 defeat the Church's demurrer.

4 To prevail on a demurrer pursuant to §430.10(c), the Church must
5 demonstrate that the cause of action for abuse of process alleged in the First
6 Cross-complaint is, for all practical purposes, identical with the cause of action for
7 abuse of process alleged in the Second Cross-complaint.¹¹ Burnard v. Irigoyen
8 (1943) 56 Cal.App.2d 624, 631, 133 P.2d 3, 7. The matters in the prior pending
9 action must be such that a judgment on the merits in the first action would
10 constitute a bar to the second action. Hall v. Susskind (1895) 109 Cal.203, 41 P.
11 1012, aff'd (1898) 120 Cal. 550, 53 P. 46. Moreover, the second claim must
12 involve the same parties that were involved in the first claim. W.R. Grace & Co. v.
13 California Employment Com. (1944) 24 Cal.2d 720, 727, 151 P.2d 215, 219.
14 The parties must stand in the same relative positions as plaintiff and defendant in
15 the two actions. Western Pine & Steel Co. v. Tuolumne Gold Dredging Corp.
16 (1944) 63 Cal.App.2d 21, 29, 146 P.2d 61, 65. Finally, the moving party must
17 show that there is, in fact, another pending action, which was commenced before

18
19 ¹¹ The courts have held further that when determining whether the doctrine of
20 res judicata bars a second action, duplication of the language and form between
21 the two causes of action is secondary to whether they are duplicative in intent and
22 scope. "Whenever a judgment in one action is raised as a bar to a later action
23 under the doctrine of res judicata, the key issue is whether the same cause of
24 action is involved in both suits. California law approaches the issue by focusing on
25 the 'primary right' at stake: if two actions involve the same injury to the plaintiff
26 and the same wrong by the defendant then the same primary right is at stake even
27 if in the second suit the plaintiff pleads different forms of relief and/or adds new
28 facts supporting recovery." Eichman v. Fotomat Corporation (1983) 147
Cal.App.3d 1174, 197 Cal.Rprt. 612 at 614. Other courts have held
similarly that "[t]he fact that the second action involves the pleading of different
theories of recovery, seeks different forms of relief and/or adds new facts
supporting recover is immaterial." Zimmerman v. Stotter (1984) 160 Cal.App.3d
1067 at 1073, 207 Cal.Rptr. at 112. See, also, California Coastal Commission v.
Superior Court (Ham) (1989) 210 Cal.App.3d 1488, 258 Cal.Rprt. 1488 and
Tensor Group v. City of Glendale (1993) 14 Cal.App.4th 154, 17 Cal.Rprt.2d 639.

1 the filing of the action in which demurrer is urged. Kirman v. Borzage (1949) 89
2 Cal.App.2d 898, 903, 202 P.2d 303. An action is deemed to be pending from the
3 time of its filing until its final determination on appeal. C.C.P. §1049.

4 Here, Armstrong has not alleged different facts in support of his abuse of
5 process claim, although he has, with this iteration, changed the language.
6 Armstrong's claims of years of "harassment" by the Church, which foolishly paid
7 him large sums of money in settlement of one false claim, are already the subject
8 of litigation in Los Angeles. Armstrong may not re-litigate the same claims here.

9 Similarly, there is an identity of parties between the two actions. Both of
10 the cross-defendants named in the Second Cross-complaint were named as cross-
11 defendants by Armstrong in the First Cross-complaint.¹² In the second action, as
12 in the first, only the Church has been served with the Cross-complaint. Moreover,
13 the Church and Armstrong stand in precisely the same position in the Third Cross-
14 complaint as they do in the First.

15 Finally, it is plain from court records which this Court may judicially notice
16 that the First Cross-complaint was commenced before the Third Cross-complaint,
17 and is still pending. Armstrong filed a cross-complaint in the initial action on July
18 21, 1992. [Ex. 8 to Request for Judicial Notice.] On October 7, 1992, he filed an
19 amended cross-complaint in that action, the First Cross-complaint, which includes
20 as its second cause of action the claim for abuse of process which Armstrong has
21 replicated herein. [Ex. 1 to Request for Judicial Notice.] On March 3, 1993, the
22 Church filed a motion for summary adjudication of, inter alia, the second cause of
23

24 ¹² The fact that Armstrong has named, but not served, other defendants in the
25 first action is irrelevant. The only question to be decided is whether the rights of
26 the parties to the second action will be completely adjudicated by the first.
27 Because here all of the named parties to the second action (Armstrong, the Church
28 and Mr. Miscavige) are also named parties to the first action, standing in the same
relationship to one another, their collective rights will be completely determined in
the first action, rendering the second action superfluous.

1 action contained in the First Cross-complaint. [Exs. 4 - 5 to Request for Judicial
2 Notice.] On March 23, 1993, the Court in the Los Angeles action ordered a stay
3 of all proceedings therein, pending resolution of an appeal filed by Armstrong to
4 the preliminary injunction obtained by the Church. [Ex. 6 to Request for Judicial
5 Notice.] The appeal of the preliminary injunction has been briefed to the Second
6 District Court of Appeal, but has not yet been set for oral argument. [Ex. 9 to
7 Request for Judicial Notice.] The entire Los Angeles action, including Armstrong's
8 First Cross-complaint, is thus still awaiting determination.

9 With this identity of claims and parties present in a currently pending prior
10 action, this Court must sustain the Church's demurrer pursuant to C.C.P.

11 § 430.10(c).

12 **IV. DEMURRER MUST BE SUSTAINED AS TO ARMSTRONG'S**
13 **CAUSE OF ACTION FOR ABUSE OF PROCESS**

14 In California, "[a] complaint for declaratory relief must demonstrate: (1) a
15 proper subject of declaratory relief, and (2) an actual controversy involving
16 justiciable questions relating to the rights or obligations of a party." Brownfield v.
17 Daniel Freeman Marina Hospital (1989) 208 Cal.App.3d 405, 410, 256 Cal.Rptr.
18 240, 243. Code of Civil Procedure Section 1060 defines the "proper subjects" for
19 declaratory relief inter alia: "Any person interested . . . under a contract, or who
20 desires a declaration of his rights or duties with respect to another, or in respect
21 to, over or upon property. . . ." However, "an action in declaratory relief will not
22 lie to determine an issue which can be determined in [an] underlying . . . action."
23 California Insurance Guarantee Association v. Superior Court (1991) 231
24 Cal.App.3d 1617, 1623, 283 Cal.Rptr. 104, 108. It is well-settled that, "[t]he
25 declaratory relief statute should not be used for the purpose of anticipating and
26 determining an issue which can be determined in the main action. The object of
27 the statute is to afford a new form of relief where needed and not to furnish a
28 litigant with a second cause of action for the determination of identical issues." Id.

1 at 1624, quoting General of America Ins. Co. v. Lilly (1968) 258 Cal.App.2d 465,
2 470, 65 Cal.Rptr. 750.

3 Further, pursuant to Code of Civil Procedure Section 1061, the Court may,
4 in its discretion, refuse to exercise the power to grant declaratory relief "where
5 such relief is not necessary or proper at the time under all of the circumstances.
6 The availability of another form of relief that is adequate will usually justify refusal
7 to grant declaratory relief." California Insurance Guarantee Assoc., supra, 231
8 Cal.App.3d at 1624. In such cases, it is proper for the Court to sustain a demurrer
9 without leave to amend. Communist Party of United States of America v. Peek
10 (1942) 20 C.2d 536, 127 P.2d 889; General of America Ins. Co., supra.

11 Here, Armstrong lists five "declarations" which he would like to obtain from
12 the Court herein:

- 13 a. Whether or not the settlement contract upon which
14 Scientology bases its right to proceed herein is legal and enforceable;
- 15 b. Whether or not Scientology is a creditor within the
16 meaning of the Uniform Fraudulent Transfer Act;
- 17 c. Whether or not Scientology has a claim within the
18 meaning of the Uniform Fraudulent Transfer Act;
- 19 d. Whether or not Armstrong is a debtor within the meaning
20 of the Uniform Fraudulent Transfer Act;
- 21 e. Whether or not Armstrong owes a debt to Scientology
22 within the meaning of the Uniform Fraudulent Transfer Act.

23 Third Cross-Complaint, ¶ 55.

24 Each of these requested "declarations," however, is already an issue which
25 will be determined by a previously existing action between the parties. In the first
26 action presently pending in Los Angeles, the Church is attempting to obtain
27 damages from Armstrong for breach of the settlement contract, and to enforce it
28 by injunction. [First Amended Complaint, Ex. 1 to Second Request for Judicial
Notice.] Indeed, the Los Angeles Superior Court has already issued a preliminary
injunction enforcing certain provisions of the contract. [Ex. 2 to Second Request

1 for Judicial Notice.] In that action, Armstrong has asserted, by answer and by
2 affirmative defense, that the settlement contract is illegal and unenforceable. [Ex. 3
3 to Second Request for Judicial Notice.] That question, then, is already awaiting
4 determination by the Los Angeles Superior Court, and may not become the subject
5 of a declaratory relief action here. E.g., California Insurance Guarantee, supra
6 (Declaratory relief action by insurer properly stayed pending determination of
7 liability issues in underlying action).

8 As for items (b) through (e), each must of necessity be decided by reference
9 to the Church's complaint. The Uniform Fraudulent Transfer Act does not provide
10 that a debtor may seek declaratory relief to an uncrystallized claim; rather, it
11 provides specific remedies for specific and existing misconduct. Here, the Church
12 has alleged in its complaint facts sufficient to state a claim that the Church is a
13 creditor under the Act; that the Church has a claim under the Act against
14 Armstrong; that Armstrong is a debtor within the meaning of the Act; and that
15 Armstrong owes a debt to the Church under the Act. Armstrong, by Answer, has
16 denied each of these issues. Each of these issues, then, must be decided in order
17 to adjudicate the Church's claim. To relitigate them in the context of a cross-
18 complaint can serve no conceivable purpose.¹³

19 Under these circumstances, declaratory relief is neither necessary nor
20 proper, and should be denied.

21
22 ¹³ Moreover, "[d]eclaratory relief operates prospectively, serving to set
23 controversies at rest . . . there is no basis for declaratory relief where only past
24 wrongs are involved." Baldwin v. Marina City Properties, Inc. (1978) 79
25 Cal.App.3d 393, 407, 145 Cal.Rptr. 406, 414. Here, the acts which comprise
26 Armstrong's fraudulent conveyances are past actions pled in the Church's
27 complaint. The Church claims that, beginning in August of 1990, Armstrong
28 deliberately conveyed his assets to others while breaching his agreement with the
Church, and incurring substantial debt in the form of liquidated damages.
Armstrong's denial of these actions frame the issues of this case. No future rights
of the parties under the Fraudulent Conveyance Act could be adjudicated by a
declaratory relief action, as it is only specific actions which trigger applicability of
that statute.

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V. CONCLUSION

Armstrong's Third Cross-complaint recites stale facts which do not result in a claim for abuse of process or declaratory relief. The few allegations which concern matters not barred from consideration by the relevant statute of limitations are barred from consideration by the absolute privilege afforded by Civil Code Section 47(b). Moreover, the Third Cross-complaint is a clever duplicate of an action already pending between these parties in Los Angeles. Armstrong's frivolous reassertion of these claims here wastes the time of both the Court and the Church. Armstrong has already amended this cross-complaint once, to this fruitless effect. The Church's demurrer must be sustained with prejudice.

DATED: March 1, 1994

BOWLES & MOXON

By: Laurie J. Bartilson
Laurie J. Bartilson

Andrew H. Wilson
WILSON, RYAN & CAMPILONGO

Attorneys for Plaintiff
and Cross-Defendant
CHURCH OF SCIENTOLOGY
INTERNATIONAL

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is 6255 Sunset Boulevard, Suite 2000, Los Angeles, CA 90028.

On March 1, 1994, I served the foregoing document described as CHURCH OF SCIENTOLOGY INTERNATIONAL'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS DEMURRER TO GERALD ARMSTRONG'S FIRST AMENDED CROSS-COMPLAINT on interested parties in this action,

by placing the true copies thereof in sealed envelopes as stated on the attached mailing list;

by placing the original true copies thereof in sealed envelopes addressed as follows:

FORD GREENE
HUB Law Offices
711 Sir Francis Drake Blvd.
San Anselmo, CA 94960-1949

MICHAEL WALTON
P.O. Box 751
San Anselmo, CA 94979

BY MAIL

*I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

Executed on March 1, 1994, at Los Angeles, California.

**(BY PERSONAL SERVICE) I delivered such envelopes by hand to the offices of the addressees.

Executed on _____, at Los Angeles, California.

[] BY FACSIMILE TRANSMISSION: From FAX No. (213) 953-3351 to the below persons at the facsimile numbers indicated, at _____.m., directed to the below addresses. The facsimile machine I used complied with Rule 2003(3), and no error was reported by the machine. Pursuant to Rule 2005(i), I caused the machine to print records of the transmissions, copies of which are attached to this declaration.

FORD GREENE
HUB Law Offices
711 Sir Francis Drake Blvd.
San Anselmo, CA 94960-1949
FAX No. (415) 456-5318

MICHAEL WALTON
P.O. Box 751
San Anselmo, CA 94979
FAX No. (415) 394-8560

Executed on _____, at Los Angeles, California.

[X] (State) I declare under penalty of the laws of the State of California that the above is true and correct.

[] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Print or Type Name

Signature

* (By Mail, signature must be of person depositing envelope in mail slot, box or bag)

** (For personal service signature must be that of messenger)